

Agreement executed pursuant to §800.6(b)(1) that is filed with the Council shall be considered to be an agreement with the Council for the purposes of Section 110(1) of the Act. The Agency Official shall ensure that the undertaking is carried out in accordance with the Memorandum of Agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The Agency Official and the SHPO/THPO are the signatories to a Memorandum of Agreement executed pursuant to §800.6(b)(1).

(ii) The Agency Official, the SHPO/THPO, and the Council are the signatories to a Memorandum of Agreement executed pursuant to §800.6(b)(2).

(iii) The Agency Official and the Council are signatories to a Memorandum of Agreement executed pursuant to §800.7(a)(2).

(2) *Invited signatories.* (i) The Agency Official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a Memorandum of Agreement concerning such properties.

(ii) The signatories should invite any party that assumes a responsibility under a Memorandum of Agreement to be a signatory.

(iii) The refusal of any party invited to become a signatory to a Memorandum of Agreement pursuant to §800.6(c)(2)(i) or (ii) does not invalidate the Memorandum of Agreement.

(3) *Concurrence by others.* The Agency Official may invite all consulting parties to concur in the Memorandum of Agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the Memorandum of Agreement does not invalidate the Memorandum of Agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a Memorandum of Agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A Memorandum of Agreement shall include provisions for termination and for reconsideration of

terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a Memorandum of Agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a Memorandum of Agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the Agency Official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a Memorandum of Agreement cannot be carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The Agency Official shall either execute a Memorandum of Agreement with signatories under §800.6(c)(1) or request the comments of the council under §800.7(a).

(9) *Copies.* The Agency Official shall provide each consulting party with a copy of any Memorandum of Agreement executed pursuant to this subpart.

#### **§800.7 Failure to resolve adverse effects.**

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to §800.6(b)(2), the Agency Official the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the Agency Official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to §800.7(c) and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the Agency Official and the Council may execute a Memorandum of Agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to § 800.7(c).

(4) If the Council terminates consultation, the Council shall notify the Agency Official, the agency's Federal Preservation Officer and all consulting parties of the termination and comment under § 800.7(c). The Council may consult with the agency's Federal Preservation Officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a Memorandum of Agreement will be executed. The Council shall provide them to the Agency Official when it executes the Memorandum of Agreement.

(c) *Comments by the Council—(1) Preparation.* The Council shall provide an opportunity for the Agency Official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the Agency Official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under §§ 800.7(a) (1) or (3) or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or § 800.7(a)(4), unless otherwise agreed to by the Agency Official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the Agency Official, the agency's Federal Preservation Officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(1) of the Act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursu-

ant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

#### **§ 800.8 Coordination with the National Environmental Policy Act.**

(a) *General principles—(1) Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an Environmental Impact Statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party rules.* SHPO/THPOs, Indian tribes and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency Officials should ensure that preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) and an EIS